
In The

Supreme Court of the United States

Supreme Court, U. S.
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October Term 1976

No. 76-1511

In the Matter of

MURRAY GLANTZ, An Attorney,

Petitioner,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT**

STATEMENT

Petitioner, Murray Glantz, petitions this Court for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review that Court's determination made the 15th day of January, 1976, suspending Murray Glantz from practicing law in the State of New York for a period of 3 months. A stay of the aforesaid suspension resulted in the actual suspension commencing the 13th day of May, 1976.

OPINION BELOW

The opinion of the Appellate Division of the Supreme Court, First Department, is annexed hereto as an appendix. The Court of Appeals did not write an opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The Court of Appeals of the State of New York denied leave to appeal on the 4th day of May, 1976.

QUESTIONS PRESENTED

1. Whether the New York statute, Section 90 of the Judiciary Law relating to disciplining of attorneys-at-law in the State of New York, is constitutional since it treats attorneys different from any other professional group (Fourteenth Amendment, United States Constitution)?

2. Whether petitioner was denied a constitutionally fair hearing in accordance with due process of law, when the Appellate Division rejected a report recommending exoneration from its own Referee, despite the fact that that Court heard and saw no witnesses and refused to permit oral argument (Fifth and Fourteenth Amendments, United States Constitution)?

3. Whether petitioner was deprived of a right of confrontation in this proceeding by virtue of his inability to confront the charges brought before the Appellate Division by the Bar Association, concerning prior admonitions by the Grievance Committee, which had never been presented to the Referee (Sixth and Fourteenth Amendments, United States Constitution)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as Section 90 of the Judiciary Law of the State of New York, are involved herein.

A SUMMARY OF THE FACTS OF THE CASE

The petitioner, Murray Glantz, an attorney at law who had been admitted to practice in 1956, was charged under two specifications of misconduct for allegedly failing to diligently prosecute claims with respect to two separate individuals.

From a reading of the opinions of the Referee and the court below, there is no allegation that any moneys were misappropriated by the petitioner.

Since the opinion of the Referee, Louis J. Paley, Esq., and that of the Appellate Division (*Matter of Glantz*, ____A.D.2d ____, 378 N.Y.S.2d 393), are being appended hereto, we need not go into extensive detail with respect to the findings and the facts.

Suffice it to say that the thrust of the charge which resulted in the order of a three-months suspension, was that the petitioner had failed to prosecute a claim in the United States District Court for the Southern District of New York on behalf of one Carole Farr. As a result of this, the action was dismissed by order of that court on or about July 2, 1963. Petitioner failed to appear or otherwise submit papers in opposition to a motion by the defendant to dismiss that claim.

Well within the one year period during which a motion to restore the case to the calendar could have been made, Murray Glantz returned the entire file of the Carole Farr case to the forwarding attorney (Louis Schacter). The forwarding attorney,

for some reason, made no motion to restore the case to the calendar until approximately one year and four months after the entry of the order of dismissal.

Apparently no disciplinary action at all was taken against the forwarding attorney despite the fact, as we understand it, that it was manifest that this forwarding attorney had deceived the client for about six years thereafter into believing that the case was on the calendar and that settlement negotiations were in progress. It is important to note that the record does not support any inference whatsoever that Murray Glantz misrepresented to the client or to the forwarding attorneys as to what had occurred.

The forwarding attorney made a settlement, apparently satisfactory to the client, of a substantial sum of money without seeking contribution at all from Murray Glantz.

It is extremely significant to note that the Referee, Louis J. Paley, Esq., reported that the charges brought by the Association of the Bar had not been sustained.

The Association of the Bar sought to have the Appellate Division reject the report of the Referee, which it did in part by determining that the first charge with respect to Carole Farr was sustained, but confirming the Referee's report that the second charge, with respect to one William Robinson, should be dismissed.

The petitioner, Glantz, was apparently found to have been negligent in the manner in which he handled this particular claim in the United States District Court. There is no indication or finding that he did anything deliberately or willfully with respect to the rights of the client. Indeed, it is difficult to understand how the Appellate Division could have found that petitioner did nothing with respect to seeking to restore the case to the calendar between July 2, 1963, when an order dismissing

the case was entered in the District Court, and the beginning of 1964 when Glantz returned the entire file to Louis Schacter.

The entry of an order of dismissal, unless served upon the petitioner, would have in all likelihood been unknown to him. Certainly, it would have remained unknown to him for some time. We merely mention this to have this Court recognize that the inference that he delayed between July 2, 1963 and the beginning of 1964, does not mean that he intentionally and knowingly did so.

In seeking to convince the Appellate Division to reject the report of Referee Paley, the Association of the Bar submitted letters of admonition which had never been reviewed or reported on by the Referee, and which were completely extraneous to the charges which had been levelled against petitioner. Glantz had never been given an opportunity to confront these charges before the Referee. These admonitions were not the subject of any specifications in the proceeding which is before this Court. The Bar Association apparently took the view that with respect to punishment, they had the right to call this to the Appellate Division's attention for the first time on the motion to disaffirm.¹

An application for leave to appeal to the Court of Appeals was denied on May 4, 1976. Petitioner maintained and contends herein that under Subdivision 8 of Section 90 of the Judiciary Law, he should have been permitted to appeal as of right.

We maintain that there is no inconsistency between fair treatment of lawyers and maintenance of the long tradition of their discipline by the courts. There is no good reason why members of the legal profession, who have done so much to

1. Since the Referee's report exonerated Glantz, it is difficult to believe that the letter-admonitions were submitted on the issue of "punishment" and not to convince the Appellate Division to reject the Referee's recommendations.

protect the constitutional rights of others, should be deprived of justice with due process in hearings and appeals — rights available to all other professionals.

We maintain that as construed by New York courts, the statutory disciplinary procedure, Judiciary Law §90, is invalid.

If our position has any basis whatsoever, we maintain that this Court should permit an appeal as of right, at least to confront these issues, if for no other reason.

In addition, we contend that a question of constituted law also exists as to whether or not the Appellate Division had sufficient evidence to warrant rejection of the Referee's report.

We maintain that a question of sufficiency of evidence is a question of due process of law and not of fact or credibility.

We further appreciate that if the question of mere credibility were involved, that ordinarily this Court would not seek to substitute its own views. It is important, however, to bear in mind that the only person who heard the evidence and saw the witnesses was Referee Paley, and he reported that the charges brought against Glantz were not sustained. His opinion, no matter how it is viewed, takes the strongest exception to the allegations of the Bar Association.

As a matter of fact, it is clear that his findings and report are that the forwarding attorney, Louis Schacter, who, ironically and paradoxically was the main witness for the Bar Association, was himself the primary wrongdoer.

So much is this the case, that the Referee was constrained to note that Schacter never made any effort to obtain contribution from Glantz when the former settled the case of malpractice which had been brought against Schacter by the client, out of his own pocket.

Schacter had deceived the client, Farr, for six or seven years, into believing that her case was on the calendar and had not been settled, and he only reacted when, as the Referee found, "the plaintiff discovered to her horror that the case had actually been dismissed many years before and that she could no longer prosecute it" (Appendix, 10a).

A perusal of the record before the Referee reveals that there is really no basis for the charge of professional misconduct as to Glantz. At most, he was remiss in the handling of a case, which is something that can befall any practitioner.

We are appreciative of the fact that the Appellate Division sits as a *nisi prius* court in attorney disciplinary proceedings. We cannot, however, overlook the fact that it hears no evidence, sees no witnesses, and receives no oral argument.

Following a suspension or disbarment order from the Appellate Division, attorneys involved in disciplinary proceedings are afforded an appeal as of right to the New York Court of Appeals only with respect to issues of law which the Court of Appeals finds directly involve the construction of the State or Federal Constitutions or apparently in a case in which an Appellate Division Justice dissents. See New York Constitution, Article 6, §3; CPLR 5501 *et seq.*, 5601 *et seq.* Thus, in the ordinary case, an attorney convicted of professional misconduct by the Appellate Division cannot secure any appellate review of questions of law or fact. *Matter of Flannery*, 212 N.Y. 610, 611 (1914).

Section 90 of the New York Judiciary Law is in tune with these legal traditions, for it specifically states that such proceedings are the province of the courts. The statute has been construed as a reaffirmation and restatement of inherent judicial power. Thus, *In re Anonymous*, 21 A.D.2d 48, 51, 248 N.Y.S.2d 368, 372 (1st Dept. 1964), an action to suspend an attorney on grounds of mental deficiency, the court noted:

"The statute is 'declaratory of a jurisdiction that would have been implied.' The sense of the opinion by Chief Judge Cardozo in the *Karlin* case [*People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928)] is that the court has very broad inherent powers of supervision and that the statute is not restrictive but expressive of that power." (Citations omitted.)

See also *Jones v. Hulse*, 391 F.2d 198 (8th Cir.), *cert. denied*, 393 U.S. 889, 89 S. Ct. 206, 21 L. Ed. 2d 167 (1968).

Although the State of New York may properly delegate the enforcement of attorney discipline to the judiciary, it may not sidestep constitutional guarantees. As the Supreme Court stated in *Johnson v. Avery*, 393 U.S. 483, 490, n.11, 89 S. Ct. 747, 751, n. 11 (1969):

"The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."

See also *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856); *In re Fisher*, 179 F.2d 361, 369 (7th Cir. 1950), *cert. denied sub nom. Kerner v. Fisher*, 340 U.S. 825, 71 S. Ct. 59, 95 L. Ed. 606 (1950) ("The courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof."); *Staud v. Stewart*, 366 F. Supp. 1398, 1401 (E.D. Pa. 1973); *In re Mackay*, 416 P.2d 823 (Alaska 1965), *cert. denied*, 384 U.S. 1003, 86 S. Ct. 1907, 16 L. Ed. 2d 1016 (1966). See also *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (on certiorari from state court: discipline could not be predicated solely on the lawyer's exercise of his Fifth Amendment right to refuse to testify or produce records at a disciplinary hearing). Cf. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (unconstitutional denial of admission); *Konigsberg v. State Bar*

of California, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810, *reh. denied*, 354 U.S. 927, 77 S. Ct. 1374, L. Ed. 2d 1441 (1957).

The New York statute, codifying judicial power to discipline attorneys is not immune to attack. Petitioner in the instant case maintains that he has been improperly adjudged guilty of professional misconduct and that the procedures under which he was so adjudged are constitutionally defective.

Disciplinary proceedings are particularly susceptible to abuse because of their summary character. ([Lyman, *State Bar Discipline and the Activist Lawyer*, 8 Har. Civ. Rights — Civ. Lib. L. Rev. 235 (1973).])

"Only by providing that the social enforcement mechanism must function strictly within [constitutional] bounds can we hope to maintain an ordered society that is also just." (*Boddie v. Connecticut*, 401 U.S. 371, 375).

REASONS FOR GRANTING THE WRIT

I.

The petitioner was denied equal protection and due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The Appellate Division of the Supreme Court sits as a *nisi prius* court in disciplinary proceedings and yet hears no testimony, sees no witnesses, and permits no oral argument.

The petitioner was ordered to submit to a hearing before Referee Paley, who was appointed by the Appellate Division to hear and report (not to determine) with respect to the two charges of professional misconduct which had been lodged against Glantz by the Association of the Bar of the City of New York. Ironically, the Referee reported that the charges were *not* sustained.

Without affording Glantz any hearing whatsoever by way of oral argument or calling witnesses, the Appellate Division rejected Referee Paley's report as to one of the two charges, after receiving information from the Bar Association as to alleged other professional infractions by petitioner which, however, had never been presented to the Referee.

Glantz had never been disciplined with respect to these other alleged professional transgressions and had never gone through a hearing with respect to them.

A determination of suspension or disbarment, capable of destroying an attorney's reputation and livelihood, can be a devastating sanction. For this reason *the Supreme Court has characterized disbarment proceedings as being "of a quasi-criminal nature."* *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117, *reh. denied*, 391 U.S. 961, 88 S. Ct. 1833, 20 L. Ed. 2d 874 (1968). As the Second Circuit stated in *Erdmann v. Stevens*, 458 F.2d 1205, 1209-10 (2d Cir.), *cert. denied*, 409 U.S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972):

"[I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding . . . [I]t cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. See *Bradley v. Fisher*, 80 U.S. [13 Wall.] 335, 355, 20 L. Ed. 646 (1872); *Spevack v. Klein*, 385 U.S. 511, 516, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment — loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his

ability to carry out his professional functions . . ." (Emphasis supplied.)

When an individual is faced with a criminal prosecution, strict adherence to the full panoply of due process protections is guaranteed. United States Constitution, Amendments V, XIV. In other situations, the importance of the right as well as the need of the state for summary procedures to carry out particular public policies have been balanced in determining which procedural protections must apply. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (suspension of students); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972) (revocation of parole); *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) (suspension of driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (termination of relief payment); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102, 83 S. Ct. 1175, 1179-1180, 10 L. Ed. 2d 224 (1963) (exclusion from bar); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (listing of "subversive" organizations). Here we must determine which protections are required when the suspension or disbarment of an attorney is at stake and whether limited procedural protections are permitted because of the nature of the lawyer's relationship to the Court.

Because due process calls for such procedural protections as the particular situation demands,

"consideration of what procedures due process may require under any set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748-49, 6 L. Ed. 2d 1230, *reh. denied*, 368 U.S. 869, 82 S. Ct. 22, 7 L. Ed. 2d 70 (1961).

Glantz does not deny that the state has an interest in orderly procedures for adjudicating attorney disciplinary proceedings. We submit, however, that New York does not provide a constitutional means for disciplining attorneys, since the procedures under Section 90 of the Judiciary Law, we maintain, are unconstitutional.

For all intents and purposes, there is no appeal as of right from an order adjudging an attorney guilty of professional misconduct and ordering his suspension or disbarment. We recognize that subsection 8 of §90 of the Judiciary Law expressly provides that either petitioner or respondent may appeal as of right from a final Appellate Division order in a disciplinary proceeding "upon questions of law involved therein" subject only to certain limitations on the appellate jurisdiction of the Court of Appeals in the New York Constitution, Article 6, §5.

The state court has construed "directly involve" *not* to include due process questions arising out of the Appellate Division decision and not "necessarily involved in the decision of the case." (*Javits v. Stephens*, 382 F. Supp. 131, 140-142 (S.D.N.Y. 1974); *Fryberger v. N.W. Harris Company, Inc.*, 273 N.Y. 115). Thus, for the most part, appeal must be by permission of the Appellate Division or the Court of Appeals [CPLR §5602(a)].

While we recognize that the Court of Appeals has construed the due process questions arising out of the Appellate Division decisions in a very strict sense, we maintain that the overriding nature of the constitutional framework in which disciplinary proceedings are held, raise a substantial constitutional question which should be viewed by this Court.

We ask this Court to deem that it comes within the purview of subdivision 8 of Section 90 of the Judiciary Law.

Glantz maintains, therefore, that his due process and equal protection rights are denied because he has no automatic right of one appeal as every other non-lawyer litigant in the state has.

In addition, Glantz maintains that due process and equal protection were violated because his order of suspension was predicated upon a record insufficient as a matter of law to sustain the determinations made against him by the court below (Fifth and Fourteenth Amendments).

Lastly, as we have already noted, Glantz maintains that he was denied a Sixth Amendment right of confrontation by being foreclosed in this case from answering and confronting the admonitions called to the lower court's attention for the first time in the brief of the Association of the Bar.

In the court below, Glantz was precluded from presenting oral argument before the court, which is a court of original jurisdiction in a disciplinary proceeding. Thus, he has never been granted an opportunity to be heard.

"The fundamental requisite of due process is the opportunity to be heard." *Granniz v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914). Particularly when a person's good name, integrity, reputation or honor is at stake because of government action, a full and fair hearing should include, at the very least, notice of the charges or complaint, disclosure of the evidence supporting the charges, and an opportunity to be heard and to confront and cross-examine witnesses. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707, 33 L. Ed. 2d 548 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103, 83 S. Ct. 1175, 1180, 10 L. Ed. 2d 224 (1963);

Greene v. McElroy, 360 U.S. 474, 492, 496-97, 79 S. Ct. 1400, 1411, 1413, 3 L. Ed. 2d 1377 (1959).

It follows that in attorney disciplinary proceedings, due process requires a reasonable opportunity to present a defense to the trier. See, e.g., *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117, reh. denied, 391 U.S. 961, 88 S. Ct. 1833, 20 L. Ed. 2d 874 (1967); *Kivitz v. SEC*, 475 F.2d 956 (D.C. Cir. 1973); *In re Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954). The hearing "must be granted . . . in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965).

In addition, the tribunal sitting as a *nisi prius* court, has had no opportunity to evaluate the credibility of witnesses. It has been said in *Morgan v. United States*, 298 U.S. 468, 481, that "the one who decides must hear."

When the credibility of witnesses is involved, a meaningful hearing should include their appearance before the trier-of-fact so that it can observe their demeanor. As Judge Learned Hand wrote in *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952):

"It is true that the carriage, behavior, bearing, manner and appearance of a witness — in short, his 'demeanor' — is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the

hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

Although the Appellate Division's scope of review is somewhat broader [N.Y. C.P.L.R. 5501(c)], New York practice recognizes that the trial judge is in the best position to evaluate evidence. He who "has seen and heard the witnesses and has opportunity to question them . . . has often an advantage over the appellate judge who must reach his conclusion upon the written record alone." *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61, 50 N.E. 2d 542, 544 (1943).²

To further exacerbate the affront to due process and equal protection, Glantz has been denied an opportunity to argue orally before the factfinding court.

The importance of oral argument before the factfinding court to assist it in drawing inferences and evaluating probative force of the evidence cannot be underestimated. It is an essential part of the trial which may not be denied to a litigant. The Supreme Court has just re-emphasized this point in declaring unconstitutional a New York practice permitting the court to deny counsel the opportunity to make a summation at the end of a criminal case tried without a jury. *Herring v. New York*, 422 U.S. 853, 95 S. Ct. 2550 (1975):

2. The Appellate Division relied on the written record and matters *dehors* the record, i.e., the letter-admonitions.

"There can be no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial. . . . [T]he overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense. . . . [T]here can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all. . . . In denying the appellant this right under the authority of its statute, New York denied him the assistance of counsel that the Constitution guarantees." (Footnotes omitted.)

The denial of oral argument by the *nisi prius* court is a denial of the right to counsel under the Sixth Amendment of the United States Constitution. Since the Sixth Amendment is incorporated into the Fourteenth Amendment's right to due process, the New York attorney disciplinary practice constitutes a denial of due process. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).

At the appeals level, limiting argument may, in some cases, be justified. See *Federal Communications Com'n. v. WJR, The Goodwill Station*, 337 U.S. 265, 276, 69 S. Ct. 1097, 1103-04, 93 L. Ed. 1353 (1949). But for the proceedings to be just at the trial level, where the issues and facts, including the credibility of witnesses, must be explored fully, an opportunity for oral presentation by counsel is essential. See *Londoner v. Denver*, 210 U.S. 373, 386, 28 S. Ct. 708, 714, 52 L. Ed. 1103 (1908); K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, 240 (1960); Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 Col. L. Rev. 77, 84 (1973).

Even at the appellate level, judges and attorneys have expressed the view that oral argument, providing the opportunity for an exchange between court and counsel, often significantly affects the decision. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 66 (1975). An impressive ninety percent of the attorneys questioned in an extensive survey of attorney attitudes in three circuits agreed that:

"judges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case." *Id.* at 67.

From the discussion of the law and the facts, it is apparent that, as interpreted by the New York courts, Section 90 of the Judiciary Law denies due process to attorneys disciplined by the Appellate Division. The trier, Appellate Division, decides the facts without hearing the witnesses and without the opportunity to determine credibility by observing them testify; it denies counsel the opportunity to orally argue the merits of the case; and it fails to give reasons for its decision, even when it rejects the report of the Referees who have heard the witnesses.

In each of the proceedings consolidated in this case, the attorney was afforded a meaningful hearing — but only before the appointed Referee to hear and report. The Referee — the only judge to see the witnesses and pass on their demeanor — did not decide the case. In contrast, the Appellate Division, sitting as the court of original jurisdiction, acted without hearing the testimony, viewing the parties, observing the confrontation of the witnesses, or listening to arguments of counsel.

It has been suggested that the Referee in these proceedings was in fact a "court" even though he sat only as an agent of the

Appellate Division. The implication is that the Appellate Division performs a *de facto* reviewing function on a motion to confirm or disaffirm its Referee's report. But this is clearly not the case.

First, although the Appellate Division has power to review questions of fact on appeal from the decision of a court in a non-jury case, it must attach considerable weight to the trial court's judgment. As the New York Court of Appeals put it in *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61, 50 N.E. 2d 542, 544 (1943):

"In all cases the appellate court in appraising the weight of evidence must recognize that its power to reverse a finding of the trial court is not unlimited, and that the Trial Judge who has seen and heard the witnesses and has opportunity to question them and to guide the course of the trial, has often an advantage over the Appellate Judge who must reach his conclusion upon the written record alone. So this court has pointed out that, however broad may be the statutory grant of power to the Appellate Division to determine an appeal upon the merits both as to matters of law and fact, its 'power to reverse a finding of fact may be exercised only in accordance with the general rules of law regulating appeals to that court. It may not set aside a finding of value made at Special Term, unless such finding is based upon erroneous theory of law or erroneous ruling in the admission or exclusion of evidence, or unless it appears that the court at Special Term has failed to give to conflicting evidence the relative weight which it should have and thus has arrived at a value which is excessive or inadequate.'"

More recently, in *Collins v. Wilson*, 40 A.D. 2d 750, 751, 337 N.Y.S. 2d 541, 542 (4th Dept. 1972), the Appellate Division declared:

"We should not disturb findings based upon conflicting evidence and involving credibility of witnesses unless it is obvious that the court's conclusion could not be reached by any fair interpretation of the evidence."

See also, e.g., *Billington v. State*, 33 A.D. 2d 822, 823, 305 N.Y.S. 2d 737, 739 (3d Dept. 1969).

In the case of professional misconduct by physicians, chiropractors, engineers and all others covered by New York Education Law Sections 6500, 8208, review by the Appellate Division is limited by the substantial evidence test as to the facts determined by the Board of Regents. N.Y. Educ. Law, §6510(4); see, e.g., *Matter of Tompkins v. Bd. of Regents*, 299 N.Y. 469, 474, 87 N.E. 2d 517 (1949); *Corwin v. Nyquist*, 37 A.D. 2d 656, 322 N.Y.S. 2d 405, 407 (3d Dept. 1971).

By contrast, the decision of a Referee to hear and report, such as the Referee in an attorney disciplinary proceeding, is in no way binding upon the Appellate Division. It is free to substitute its own views and findings for those proposed by the Referee, for it, not the Referee, is the original trier. See, e.g., *Matter of Gehr v. Bd. of Education of City of Yonkers*, 304 N.Y. 436, 440, 118 N.Y.S. 2d 108, N.E. 2d 371 (1952); *In re Broome*, 13 A.D. 2d 657, 213 N.Y.S. 2d 821, 822-23 (2d Dept.), *rev'd on other grds.*, 10 N.Y. 2d 942, 224 N.Y.S. 2d 21, 179 N.E. 2d 862 (1961).

Second, if the Referee were in fact a "court" then in cases such as the instant one where the Appellate Division "reverses" its Referee and makes a new "finding of fact," the aggrieved attorney would have an automatic right of appeal on all

questions of law and fact to the Court of Appeals. N.Y. C.P.L.R. 5601(a)(ii); 5501(b). But attorneys in this position do not have this right precisely because the Referee is not a "court" under the statute. It would be otherwise if the Referee in an attorney disciplinary proceeding were designated to hear and *determine*. N.Y. C.P.L.R. 4001 and 4301.

Third, if the Appellate Division were hearing an appeal, it would have to "state the grounds of its decision." N.Y. C.P.L.R. 5522. As already noted, this requirement is not applicable to decisions on disbarment precisely because the proceedings in the Appellate Division are not appeals.

II.

Extraneous, prejudicial, and unsubstantiated charges in the nature of prior admonitions by the Grievance Committee, were brought before the court below without any opportunity on the part of Murray Glantz to confront them or answer them on the record before the Referee. The Referee made no determination with respect to these admonitions and since he reported that the charges formally stated were not sustained, there was no justification to refer to these admonitions before the court below on the issue of punishment.

A significant aspect which we ask this Court to bear in mind is that the Referee below concluded that neither of the charges alleged against the petitioner had been sustained. The Association of the Bar of the City of New York moved to disaffirm the report and the court below in part, granted that relief, but without affording petitioner Murray Glantz an opportunity to be heard in oral argument.

In addition, the Association of the Bar submitted certain additional material with respect to alleged prior admonitions issued by the Grievance Committee to Murray Glantz. These admonitions were not brought out before the Referee and

constituted material which, so far as we know, were never reviewed by the Referee.

The court below, in its memorandum opinion, determined that "information as to . . . prior complaints of professional misconduct is always relevant and material on the question of degree of punishment warranted"

We ask this Court to note that Murray Glantz, in essence, had been "exonerated" by the Referee, whom we recognize could only hear and report. The issue before the Appellate Division, therefore, was not a question of "punishment," but was a question of whether the report should be confirmed or disaffirmed.

It was wholly irrelevant and prejudicial for the Association of the Bar to inject these prior admonitions into the record since Murray Glantz had never been given an opportunity to confront these admonitions before the Referee, nor to call witnesses in his behalf to rebut them. The admonitions in essence are an assumption of guilt of something improper. We do not view them in that light and submit that they should have been made the subject of formal charges and specifications before the court below was told about them.

In addition, an opportunity should have been given to present Glantz' side of the charges.

Glantz was denied an effective right of confrontation since he never had an opportunity to confront the allegations of the Bar Association before the Appellate Division as to prior letters of admonition which, for the first time, it produced for consideration. These admonitions were never reviewed by the Referee and were not the subject matter of the charges that gave rise to the instant disciplinary proceedings.³

3. It is obvious that the letter admonitions were unrelated to the charges herein. Additionally, no formal hearings were held before any Referee on the admonitions. It is submitted that in all likelihood, those letter admonitions caused the Appellate Division to suspend Glantz, since the sustained charge was rejected by the Referee.

The court below, in citing *Matter of Wildove v. New York State Bar Association*, 40 App. Div. 2d 1042, 1043, 338 N.Y.S. 2d 680, 682 (3rd Dept. 1972), "that such information as to the similar disposition of prior complaints of professional misconduct is always relevant and material on the question of the degree of punishment warranted for subsequent misbehavior," is not apt since in *Wildove* the admonitions in the form of letters were part and parcel of the charges brought by the Bar Association in that very proceeding. Obviously, *Wildove* was given a right of confrontation to rebut them in the same proceeding.

In the case at bar, however, these letter-admonitions were never the subject of the instant disciplinary proceedings, and in this particular proceeding, the Referee had no opportunity to pass upon them, nor did petitioner receive a chance to litigate the sufficiency thereof before the Referee by calling witnesses or the like, since he had no prior notice that they were being relied upon.

We therefore maintain that the court below cannot rely upon *Wildove* for its actions. Unlike *Wildove*, Glantz was totally unaware that the Appellate Division would be asked to consider the prior letter-admonitions in determining his guilt or innocence of the charges before the Referee. The inclusion of these unrelated admonitions came as a bolt out of the blue when they were referred to for the first time in the Appellate Division brief of the Bar Association seeking to disaffirm the Referee's report.

The right of confrontation and cross-examination, "the greatest legal engine ever invented for the discovery of truth," was *pro tanto* denied to Glantz with respect to these letter-admonitions.

The Sixth Amendment of the United States Constitution guarantees a right of confrontation, but this right was denied to

Glantz with respect to those admonitions. (*Smith v. Illinois*, 390 U.S. 129; *Alford v. United States*, 282 U.S. 267.) (See Point I, *supra*.)

We are aware of this Court's determination in *Mildner v. Gullotta, et al.*, ____ U.S. ____ (1976), but submit that the case at bar is distinguishable in that petitioner was deprived of due process of law.

III.

Appellate review is for all intents and purposes denied to attorneys who are disciplined in the State of New York, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Llewellyn has characterized the appellate courts as the "central and vital symbol of the Law." K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, 4 (1960). Over 150 years ago, Senator Clinton declared his position in an appeal heard by the New York State Senate:

"In order to guard against the fallibility of the human understanding, and to shield the citizen from the attacks of injustice, it may be regarded as a cardinal principle in our land, that no single tribunal is intrusted with the sole determination of a man's property." *Yates v. People*, 6 Johns. 337, 455 (1810).

The New York Court of Appeals, quoting *Yates*, stated that:

"our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved." *Matter of Luckenbach*, 303 N.Y. 491, 496, 104 N.E. 2d 870 (1952).

See also, *Handy v. Butler*, 183 A.D. 359, 169 N.Y.S. 770 (2d Dept. 1918). And the court in *People v. Becker*, 239 P.2d 898, 901, 108 Cal. App. 2d 764 (1952) observed that:

"[t]he right of every man to his day in court is not limited to the trial court but embraces as well his day in the appropriate reviewing court."

All the states have recognized the importance of appellate review to a correct adjudication in criminal matters by providing some method of appeal from a criminal conviction. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956). Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. *Id.*

An analysis of the functions of appellate courts reveals their significant role. As Professor Kurland puts it:

"Any appellate court has at least three distinct functions to perform. The first is that of correcting erroneous decisions rendered by judicial tribunals inferior to it in the judicial hierarchy. The second is to maintain a consistency among the decisions of these lower courts subordinate to it, so that the law is evenhandedly applied within the system. The third is the lawmaking function of creating and amending rules of law, not only so that they may be followed by lower courts within the system, but also to provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies." Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 Cornell L. Rev. 616, 618 (1974).

Since the state subjects attorneys to the judicial process, equal protection requires it to give those attorneys the same appellate rights as it gives to all others subject to the judicial process unless it can defend its decision by a "legitimately defensible difference." Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205, 1223 (1970). The denial of appellate review is a substantial deprivation, the state's burden is great; it cannot cavalierly "bolt the door to equal justice." *Griffin v. Illinois*, 351 U.S. 12, 24, 76 S. Ct. 585, 593, 100 L. Ed. 891 (1956) (Frankfurter, J., concurring). All people charged with misconduct must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court." *Chambers v. State of Florida*, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716 (1940).

For all intents and purposes, no right of appellate review exists in this case. As we have already pointed out, Glantz must seek leave to appeal if he hopes to obtain any appellate review, unless he comes within subdivision 8 of §90.

No other professional in this state, or, for that matter, no other litigant in this state, is similarly barred.⁴

While we recognize that due process does not require a state to provide litigants with appellate review, the same is not true where, as here, the state has failed to provide for a full and fair hearing in the court of original jurisdiction.

As the Supreme Court states in *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80, 50 S. Ct. 228, 230, 74 L. Ed. 710 (1930):

"As to the due process clause of the Fourteenth Amendment, it is sufficient to say that as frequently determined by this court, the right of

4. See Appendix, p. 26a, *infra*.

appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."

See also, e.g., *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L. Ed. 2d 36 (1972). "A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955), and if it is not afforded at the trial level, corrective action by way of appeal must be possible.

The Appellate Division does not afford a party one fair hearing; it may impose discipline without ever observing the witnesses or parties. In such cases, the Fourteenth Amendment would at least require the state to give the attorney the process due him through appellate review. The New York attorney disciplinary statute does not provide review for all attorneys aggrieved by the Appellate Division's decision.

The statute has another defect. It permits the Appellate Division to reverse its Referee's report and severely punish an attorney without stating the evidence it relies on or the reasons for its decision. This strikes at the very heart of due process. It not only may promote arbitrariness by the decision-maker; it makes detection of arbitrary conduct more difficult in any review of the decision.

With respect to the equal protection clause, we maintain that Glantz should be entitled to an appeal as of right.

As one of New York's distinguished judges recently wrote, in this state:

"The notion is firmly rooted that a litigant is entitled to at least one review of a final decision." Hopkins, *The Role of an Intermediate Appellate Court*, 41 Brooklyn L. Rev. 459, 463 (1975).

Civil litigants, following a decision from the court of original jurisdiction, such as the Supreme Court, the County Court or the Family Court, may appeal to the Appellate Division where questions of law and fact are reviewed.

Criminal defendants also have at least one appeal as of right, with a similar scope of review.

Moreover, when other professionals, such as physicians, chiropractors, pharmacists, and engineers are disciplined, the Appellate Division hears appeals from the decision of the Board of Regents. It may review all questions of law and the facts according to the "substantial evidence" standard. See, e.g., *Corwin v. Nyquist*, 37 A.D. 2d 656, 322 N.Y.S. 2d 405 (3d Dept. 1971); *Miller v. Board of Regents of University of State of N.Y.*, 30 A.D. 2d 994, 294 N.Y.S. 2d 29 (3d Dept. 1968).

Attorneys, on the contrary, have no parallel rights. Pursuant to the New York attorney disciplinary statute, aggrieved attorneys are entitled to a review as of right only when the Court of Appeals finds constitutional questions controlling, or, apparently, when an Appellate Division Justice dissents. N.Y. Jud. Law., §90(8); N.Y. C.P.L.R. 5601. Even if such an appeal is granted, the Court of Appeals' review is severely limited. It may review questions of law, but it will affirm the disciplinary decision if there is "some evidence" to support it, substantial or not. See *Matter of Goodman*, 199 N.Y. 143, 144, 92 N.E. 211 (1910); see also, *Del Bello v. Westchester County Bar Assn'n.*, 19 N.Y. 2d 466, 472, 280 N.Y.S. 2d 651, 655, 227 N.E. 2d 579 (1967); *Matter of Robinson*, 209 N.Y. 354, 359, 103 N.E. 160 (1913); *Matter of Flannery*, 212 N.Y. 610, 106 N.E. 630 (1914). For an analysis of the pertinent statutes relating to the right of appellate review for all litigants in New York see Appendix, pps. 26a-27a). Even the English system, upon which our disciplinary system is modeled, provides for an appeal from the findings and order of the disciplinary tribunal to a divisional court of the Queen's Bench Division and from there

with leave to the House of Lords. P.A. Leach, *The New Look in Disciplinary Enforcement in England*, 61 A.B.A.J. 212, 213 (1975).

See also, *Griffin v. Illinois*, 351 U.S. 12, 18, where the Supreme Court held that an appeal cannot be afforded to some litigants and capriciously or arbitrarily denied to others "without violating the Equal Protection Clauses."

It is true that the state has a high duty "to preserve public confidence in the judicial institution and to protect the courts and public from misconduct." Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 Col. L. Rev. 1039 (1952). But it owes a similar duty to protect the public from other unfit professionals — doctors, pharmacists, and architects — who can also cause great injury. In *Pordum* the court was concerned with the necessity of an immediate, as opposed to a slightly delayed, hearing. In this case we are concerned with the procedural safeguard of an appeal from a final decision imposing a grievous sanction. The state gives no reasons for denying this important right to attorneys while affording it to all other litigants, including all other professionals.

Perhaps the Association of the Bar will refer to the fact that judges are disciplined in much the same manner as lawyers. This is not apposite since a trial judge who is removed following a disciplinary proceeding may still continue to practice his profession. (Cf. *Friedman v. State of New York*, 24 N.Y. 2d 528; and Vol. III, *Martindale-Hubbell Law Directory*, 1132 [1975]).

A lawyer, however, loses his license to practice and thus his ability to earn a living in the only way that he is trained to do.

Other professionals have review either by Article 78 proceedings or by appeal.

Moreover, the need for swift discipline is not peculiar to attorneys since it is equally applicable to doctors and other professionals.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

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APPENDIX

ORDER DENYING LEAVE TO APPEAL

(Filed May 4, 1976)

**COURT OF APPEALS
STATE OF NEW YORK**

Mo. No. 357

**In the Matter of
Murray Glantz, an Attorney.**

The Association of the Bar of the City of New York,

Respondent,

Murray Glantz,

Appellant.

Motion for leave to appeal &c. denied.

All concur.

May 4, 1976

Clerk

REFEREE'S REPORT**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT**

In the Matter

-of-

MURRAY GLANTZ,

An Attorney

TO THE APPELLATE DIVISION OF THE SUPREME
COURT OF THE STATE OF NEW YORK — FIRST
DEPARTMENT

RECEIVED FROM

Referee

Aug. 29, 1975 at

Room 359-M, 60 Center St. N.Y.

I, LOUIS J. PALEY, the Referee appointed herein by order of this Court dated and filed in the office of the Clerk of this Court on October 31, 1972, to take testimony and report to this Court with reference to a charge of professional misconduct against the above-named respondent, as set forth in the petition of The Association of the Bar of the City of New York, verified the 26th day of June, 1972, do hereby report as follows:

Before entering upon the discharge of my duties as Referee herein pursuant to the aforesaid Order of this Court, to wit, on the 25th day of June, 1973, I was duly sworn as Referee herein before Hon. George Postel, one of the Justices of the Supreme Court of New York.

Referee's Report

Petitioner was represented herein by its attorney, John G. Bonomi, Esq. (by David A. Cobin, Esq. and Morris Gutt, Esq., of Counsel). Respondent was represented herein by his attorney, William E. Jacobs, Esq. A hearing was held before me on July 25, October 2, October 23 and November 7, 1973.

The Charges

The petition of The Association of the Bar of the City of New York sets forth two separate charges:

Charge I

1. In April, 1961, Louis Schacter, Esq. and Howard Eisenberg, Esq., referred to respondent for prosecution in the courts, the personal injury claim of Carole Farr, resulting from a train accident on or about March 15, 1961.

2. Thereafter, on October 25, 1961, respondent commenced an action on behalf of Miss Farr in the Supreme Court, New York County, in which respondent demanded the sum of \$100,000 in damages.

3. On December 17, 1962, an order was entered granting the defendant's motion to remove the matter to the United States District Court for the Southern District of New York.

4. On or about May 14, 1963, respondent was served with a copy of the defendant's motion to dismiss the complaint for failure to prosecute.

5. Respondent, thereafter, failed to appear on the return date of the motion, or to otherwise submit any papers in opposition.

Referee's Report

6. On or about July 2, 1963, an order was entered dismissing the complaint for failure to prosecute.

7. Respondent, thereafter, failed to take any steps to restore this matter to the calendar, or to promptly advise Mr. Schacter, Mr. Eisenberg, or Miss Farr of the dismissal of the complaint.

Charge II

8. In January, 1965, respondent was retained to represent Mr. William Robinson in the prosecution of his claim for damages for personal injuries allegedly resulting from an accident which occurred on or about December 19, 1964.

9. On or about April 7, 1965, respondent commenced an action on behalf of his client in the Supreme Court, New York County, which was subsequently reduced to the Civil Court, New York County, on December 12, 1969.

10. Respondent, thereafter, failed to take any steps to prosecute this matter in the courts.

11. On or about March 9, 1971, respondent was advised by counsel for the Committee on Grievances that a complaint had been filed against him by his client concerning his failure to prosecute his claim.

12. On or about March 18, 1971, respondent filed a Notice of Trial with a Statement of Readiness representing to the Court that all preliminary proceedings had been completed.

13. On or about May 3, 1971, the defendant's motion to vacate the Statement of Readiness and strike the action from the trial calendar was granted on default.

Referee's Report

14. Respondent, thereafter, failed to take any steps to restore the matter to the calendar until October 12, 1971, the day on which respondent was advised to appear at the office of counsel to the Committee on Grievances.

The Answer

Respondent filed an answer on October 25, 1972, which, in effect, was a general denial of the specific charges against him.

The Evidence (Summarized)**As to Charge I:**

The first hearing before the Referee was held on July 25, 1973. Petitioner produced two witnesses who testified, Louis Schachter, an attorney, and his cousin Howard Eisenberg, also an attorney. The only witness for respondent was respondent himself.

Stripped of many repetitions, contradictions, irrelevant discussions and matters not pertinent to the issue, the following basic facts emerged from the evidence and may be considered established.

Petitioner's main witness, Louis Schachter, is an attorney who had represented for many years a Miss Carole Farr (Minutes, p. 11). In 1961 Farr was involved in a railroad accident in connection with which she retained Schachter. Schachter being primarily a commercial lawyer, turned the Farr case over to his cousin, Howard Eisenberg, a young attorney associated with Schachter in his office (Minutes, p. 11). Eisenberg who also had little experience with negligence cases, then with Schachter's consent referred the Farr case to respondent (Minutes, p. 13-14). It seemed that respondent had much experience in negligence actions and had handled a number of cases for Schachter and Eisenberg before.

Referee's Report

A summons and complaint in the case of *Carole Farr vs. Southern Railway Company* was received in evidence, without objection, as petitioner's Exhibits 5 and 6 (Minutes, p. 15-16). In December, 1962 the case was removed to the United States District Court for the Southern District of New York on motion of the defendant (Minutes, p. 19). On or about May 14, 1963, a motion was made in said District Court to dismiss the case for failure to prosecute. Apparently someone had overlooked the fact that the motion to dismiss was on the calendar on a particular date, and the dismissal for failure to appear followed (Minutes, p. 21-22). Eisenberg testified that respondent informed him that the case had been dismissed (Minutes, p. 22); that he was fairly informed of the progress of the case by respondent (Minutes, p. 30:) that respondent had informed him that a motion had been filed in the Federal Court by the defendant for dismissal for failure to prosecute and that the motion had been granted (Minutes, p. 32). Eisenberg further testified that he discussed the situation with Schachter (Minutes, p. 33) and that respondent was asked by Eisenberg to return the file to Schachter's office. Specifically, this was his testimony: (Minutes, p. 33-34)

"Q. In other words, you called for the case back, you took the matter away from him, is that the essence of it?"

"A. Yes."

"Q. Did you ask him to come in and bring other matters that he had in his office to your office?"

"A. Yes."

"Q. Did he bring those?"

"A. Yes."

Referee's Report

Subsequently a motion was made by Schachter to restore the case to the calendar. Eisenberg testified that he participated in the preparation of such motion (Minutes, p. 34). He admitted on cross-examination that the file was not returned to respondent once it got back to the Schachter-Eisenberg office at their request (Minutes, p. 36).

Schachter's motion to restore the case to the calendar was denied because it had been made (contrary to the federal rules of civil procedure) one year and four months after the motion to dismiss had been granted (petitioner's Exhibit 10, Minutes, p. 23). In an attempt to save Farr's cause of action from being barred by the statute of limitations, a new case was instituted (not by respondent) on behalf of Farr against the Southern Railway System on the same cause of action (petitioner's Exhibit 13, Minutes, p. 73).

When the Farr file was returned by respondent to Schachter in 1964 at the latter's request, he was also requested to return some twenty-five other cases which respondent had been handling for the Schachter-Eisenberg firm, which he did (Minutes, p. 339). After that, Eisenberg spoke infrequently with respondent (Minutes, p. 46).

Some seven or eight years later, Carole Farr retained a new attorney and commenced a malpractice suit against Schachter (Minutes, p. 47). In the complaint, she asserted no claim against respondent or against Eisenberg but only against Schachter (Minutes, p. 48). She not only charged Schachter with malpractice in mishandling her case which had resulted in her cause of action being barred by the statute of limitations, but also charged him with falsely and fraudulently representing to her that the original case was on the court calendar and that settlement negotiations in said action were in progress (see Complaint, respondent's Exhibit A, Minutes, p. 123).

Referee's Report

Schachter started to implead respondent as a third party defendant in Farr's malpractice suit by serving a third party summons upon him but without a complaint. Subsequently, Schachter settled the malpractice case which Carole Farr had brought against him in 1973, for an undisclosed amount, but he never continued his third party claim against respondent (Minutes, p. 50).

Mr. Kalik, one of the attorneys for Carole Farr, then sent a letter to the Grievance Committee enclosing a copy of the amended complaint they had served on behalf of Farr against Schachter in her malpractice suit. They sent this with the explanation that they deemed it their duty to call this matter to the attention of the Grievance Committee. At the conclusion of the hearing before the Referee herein, counsel for respondent asked that this letter of complaint from Kalik, the attorney for Ms. Farr, be produced and counsel for petitioner agreed to do so (Minutes, pp. 357-362). The hearing was closed "subject to the receipt of letter of complaint to be supplied by petitioner" (Minutes, p. 364). Finally, after several requests, a copy of said letter of complaint was received by the Referee from the attorney for petitioner on August 25, 1975.

The Referee's View of Charge I

Obviously the trouble in the Farr case started in 1963 when no-one appeared to answer the original motion to dismiss the case for failure to prosecute. Respondent is to be criticised for the negligence involved in his not having had someone answer the motion on the calendar call. One is tempted to conjecture that had that motion been answered, none of what followed would have happened and this proceeding would have been obviated, but of course, such conjecture has no place here. Nevertheless, it is fairly common knowledge amongst the legal profession that defaults on calendar calls are not infrequent and

Referee's Report

per se do not, as a rule, lead to the institution of disciplinary proceedings. They are usually rectified by motions to vacate the default which the court as a rule grants when sufficient cause is shown. What then makes this case unusual in that respect and a departure from the usual practice? The answer lies in the events that followed the default.

The evidence is fairly clear on this point. After the default in answering the calendar had occurred, respondent, rightfully, informed Eisenberg (his liaison with the Schachter office) of this unfortunate occurrence. Eisenberg in turn informed Schachter of what had happened and Schachter promptly elected to take the case away from respondent. The Farr case was Schachter's case and it was his prerogative to dismiss respondent and take the file away from him if he so desired, which he did. However, it seems to the Referee that from that point on, and under these circumstances, it became Schachter's duty to take the necessary steps to move to vacate the default and do all else that may be required to move the case along so as to permit it to be disposed of in the normal way. Apparently, this did not happen. It seems that when Schachter got around to making the motion to open the default, he had permitted more than a year to go by after the default and it was this long lapse of time, under the federal rules, that caused the motion to be denied.

Schachter testified before me that he was the attorney for the plaintiff; that he had made the motion to put the case back on the calendar and not respondent (Minutes, p. 114). He testified that after all this had happened, in 1965, he had Carole Farr in his office and that he explained the entire situation to her (Minutes, p. 116). He admitted that he took no further steps to remedy the situation by appeal or otherwise (Minutes, p. 117).

Apparently nothing happened thereafter for some five years or so (Minutes, pp. 117-119) until Carole Farr went to another lawyer who looked into the facts and then started a lawsuit on

Referee's Report

behalf of Farr against Schachter for malpractice and misrepresentation.

Now let's look at the position of respondent at that time. He had originally been given a case by a law firm (which had previously given him other cases to handle). Then someone slipped up and did not answer a calendar call on a motion. It is reasonable to suppose that had respondent been permitted to continue the case, the unfortunate calendar slip-up would have been corrected and things would have worked themselves out, as they usually do in such instances. But respondent could not do so in this case. He found that the Schachter firm, which had given him the case originally, demanded the return of the file, and he complied with such demand, and from that point on the Schachter firm handled the case. I cannot see what else respondent could have done under such circumstances. In fact, respondent testified that despite his discharge as attorney in this case, he voluntarily helped Eisenberg to draft papers in this and other cases which the Schachter firm took away from respondent at that time. I think that the responsibility of respondent in the Farr case ended when the file was taken away from him and that he could not be held accountable for the events that followed thereafter.

The evidence before me disclosed that some six or seven years later, the plaintiff discovered to her horror that the case had actually been dismissed many years before and that she could no longer prosecute it. Her new attorney advised her that she had a good cause of action for malpractice and misrepresentation by Schachter, the only lawyer she knew or held responsible for the case. Schachter's attempt to throw the blame on respondent for what had happened seems to me only a pretext with which he might try to escape his own obvious responsibility. When he was served with a summons in the malpractice case by Farr, he did serve a third party summons on respondent but obviously he had no faith in that aspect of the

Referee's Report

case for he did not prosecute it and did not even serve a complaint against respondent. He settled the case by paying Farr out of his own pocket without demanding at least some contribution from respondent.

The foregoing facts are borne out by the direct and cross-examination of Schachter, by the evidence given by Eisenberg and by the direct and cross-examination of respondent. To hold respondent liable for what happened to the Farr case after the file had been taken away from him by Schachter some seven years earlier, would result, in my opinion, in a gross miscarriage of justice. It is my opinion that the Committee on Grievances "missed the boat" in this case. It should have given careful consideration to what happened in the case from the time that the motion to dismiss for failure to prosecute was granted in 1963 to the events that lead to the filing of the charge by Mr. Kalik, Ms. Farr's new attorney. Apparently this was not done, as evidenced by the allegations in *Charge I*. That charge consists of seven paragraphs, the first six paragraphs relate solely to the institution of the action in 1961 up to the time of the dismissal of the complaint in 1963 when no-one answered the motion for the plaintiff when it was called on the calendar. These six paragraphs omit the gravamen of the matter when it omits any reference to the fact that at that point Schachter took the case back from respondent.

Paragraph 7. of *Charge I* is completely in error when it alleges as a fact the failure of respondent "to promptly advise Mr. Schachter, Mr. Eisenberg or Ms. Farr of the dismissal of the complaint." That conclusion was clearly contradicted by the testimony of each of the witnesses on both sides of the case. What is amazing to the Referee is that in drafting *Charge I*, petitioner completely ignored the ten years that followed, the taking away of the case from respondent, Schachter's meeting with Ms. Farr and the action which she brought in 1973 when she learned that her case was not on the calendar, that the

Referee's Report

statute of limitations had run out and that Schachter, to whom she looked as her attorney in the case, had given her false representations as to the status of the case. It would seem to me that if the draftsman of the charges had studied the case further, beyond his allegations of 1-6 in *Charge I*, he might have realized and reached the conclusion that he would have had a much stronger case for discipline against Schachter than he had against respondent.

On the record before me, I do not find that respondent's conduct requires discipline. I find and report that *Charge I* against respondent has not been sustained.

As to *Charge II*:

The details of *Charge II* are fully stated on page 3. of this report.

When the case first appeared for hearing before the Referee on July 25, 1973, counsel for petitioner stated that he would not be able to proceed with *Charge II* because he had been unable to contact the complaining witness, William Robinson, and he asked for an adjournment. The Referee adjourned this portion of the case over the objections of respondent's counsel (Minutes, pp. 3-5). At the next hearing on October 2, 1973, petitioner again failed to produce William Robinson (Minutes, p. 159, p. 177). Counsel for petitioner stated that they had not been able to locate the whereabouts of Robinson and that a subpoena for him had been issued but it was not served because he could not be located (Minutes, p. 177-8). Petitioner then offered in evidence pages 46-56 of the minutes of a hearing held before the Committee on Grievances on November 23, 1971 at which said William Robinson had testified. Counsel for respondent strenuously objected to the admission of this evidence. Counsel for petitioner argued that this testimony of 1971 was admissible under *Fleury v. Edwards*, 14 NY 2d 334. In that case, testimony

Referee's Report

was permitted of a witness who had died and who had previously testified before the Motor Vehicle Bureau. The Referee was of the opinion that the *Fleury* case was not applicable and that the testimony was inadmissible but he finally was persuaded to admit this testimony subject to a motion to strike it out at the conclusion of the hearing if counsel were able to persuade the Referee that this was the right course. Meanwhile, no jury being present, it seemed advisable to take the testimony to see how far it would lead. Both sides agreed to brief this question for the benefit of the court but to date no briefs were forthcoming from either side.

I am now of the opinion that whether the *Fleury* case is applicable or not is immaterial in view of the testimony which developed later.

The controversial testimony (pp. 46-56 of petitioner's Exhibit 17) merely brings out the facts that respondent was retained by Robinson to bring suit for personal injuries sustained; that such suit was commenced; that attempts to settle it had failed; that it seemed to be a case that would not succeed through trial; that Robinson borrowed money from respondent because of personal need and because he was faced with eviction from his apartment; and that he complained to the Bar Association only because he could not locate respondent during a certain week (when respondent was moving his offices to another location); that respondent had offered Robinson an opportunity to change attorneys without charging him for it or claiming a lien on the case if Robinson wished to do so. The Referee could see no harm or prejudice to respondent in the admission of the foregoing testimony and a stipulation might have been offered to the effect that if Robinson were present in court, he would have testified to these very things. I am almost certain that counsel for respondent would have acceded to such stipulation if it had been offered, for I find nothing prejudicial to respondent in this testimony. Subsequently respondent testified

Referee's Report

about this matter and explained to my satisfaction why there had been a delay in the case as charged. He explained that respondent had apprised the Grievance Committee that the case had been brought in the Supreme Court, then it was reduced to the Civil Court and was not pushed because it soon became quite obvious that it was not the type of case that should be tried but settled; that if tried, there was a good chance that it would have been lost; that many unsuccessful attempts to settle the case had been made. Respondent testified (Minutes, p. 355) that "it was a bad liability situation and there was no secret of it with Mr. Robinson." Respondent had explained to the Grievance Committee that failure of the plaintiff to reply to letters of respondent to execute an assignment to the hospital involved was a major cause of the delay in the prosecution of the case. Soon after Robinson had complained to the Grievance Committee, the case was settled with the insurance company without trial.

Counsel for petitioner offered in evidence envelopes addressed to Robinson to appear at the hearing but they had come back for lack of correct address. The case was closed without any witnesses appearing in support of *Charge II*.

The Referee is aware of the numerous negligence actions that are brought in the courts and are not pushed for disposition because insurance companies are loath to settle where negligence is questionable and the injuries superficial. This apparently was one of those cases. In the absence of the complaining witness and the fact that the case was settled, apparently to the plaintiff's satisfaction, I do not believe that the respondent was so culpable as would require discipline or admonition on the facts brought out.

Referee's Report

CONCLUSION

I find that *Charge I* and *Charge II* are not sustained.

Respectfully submitted,

s/ Louis J. Paley
Louis J. Paley
Referee

ORDER OF APPELLATE DIVISION & NOTICE OF ENTRY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter

-of-

MURRAY GLANTZ,

An Attorney.

S I R :

PLEASE TAKE NOTICE that the within is a copy of an order duly made in this proceeding and duly entered and filed in the office of the Clerk of the Supreme Court of the State of New

Order of Appellate Division & Notice of Entry

York, Appellate Division, First Department, on the 15th day of January, 1976.

Dated: New York, N.Y.

Yours etc.,

JOHN G. BONOMI
Attorney for
Office & P.O. Address
36 West 44th Street
New York, N.Y. 10036
MU 2-0606

TO: William W. Jacobs, Esq.
Attorney for Respondent
26 Court Street
Brooklyn, N.Y. 11201

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 15, 1976.

Present—Hon. Theodore R. Kupferman, Justice Presiding,
Francis T. Murphy, Jr.,
Vincent A. Lupiano,
Louis J. Capozzoli,
Myles J. Lane, Justices.

In the Matter

of

Murray Glantz,

An Attorney.

Order of Appellate Division & Notice of Entry

FILED

Jan. 15, 1976

Appellate Division, Supreme Court
First Department

M-2671

The Association of the Bar of the City of New York, by John G. Bonomi, Esq., its attorney, having presented to this Court on September 11, 1972, a petition containing charges of professional misconduct against the above-named respondent, Murray Glantz, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on December 19, 1956, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorney, William B. Jacobs, Esq., and having interposed an answer to said petition, duly verified October 24, 1972, and the Court having duly made and entered an order on October 31, 1972, appointing Louis J. Paley, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before said Referee and said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was filed in the office of the Clerk of this Court on September 3, 1975;

And the petitioner thereafter and on December 2, 1975, having moved for an order disaffirming the Referee's report insofar as it finds charges preferred against the respondent not sustained and as to those charges finding them sustained and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper;

Order of Appellate Division & Notice of Entry

Now, upon reading the petition of The Association of the Bar of the City of New York, verified June 26, 1972, the affidavit of John G. Bonomi, Esq. annexed thereto, sworn to June 22, 1972, the notice of presentation of said petition, dated June 22, 1972, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified October 24, 1972, the order of this Court, dated October 31, 1972, appointing Louis J. Paley, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on October 31, 1972, the report of Louis J. Paley, the Referee herein, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on September 3, 1975; and upon reading and filing the notice of motion for an order disaffirming the report of the Referee insofar as it finds charges preferred against the respondent not sustained and as to those charges finding them sustained and adjudging the respondent guilty of professional misconduct, dated October 3, 1975, with proof of due service thereof, and after hearing Mr. John G. Bonomi for the motion, and Mr. William B. Jacobs opposed, and due deliberation having been had thereon and upon the Per Curiam Opinion of this Court filed herein; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the report of Louis J. Paley, Esq., the Referee herein, filed in the office of the Clerk of this Court on September 3, 1975, be, and the same hereby is, disaffirmed insofar as Charge I is concerned and the Court finds that such charge has been sustained; and as to Charge II confirmed; and it is further unanimously

Ordered that said Murray Glantz be and he hereby is suspended from practice as an attorney and counselor-at-law in the State of New York for a period of three (3) months, effective

Order Of Appellate Division & Notice of Entry

February 16, 1976 and until the further order of this Court, with leave to apply for reinstatement after the expiration of said period of three (3) months upon furnishing satisfactory proof that during said period he has actually refrained from attempting to practice as an attorney or counselor-at-law and has otherwise properly conducted himself and has fully complied with Title 22, Section 603.13 of the Rules of the Appellate Division, Supreme Court, First Judicial Department, annexed hereto and made a part hereof; and it is further unanimously

Ordered that said Murray Glantz be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, for a period of three (3) months, effective February 16, 1976, and until the further order of this Court; and it is further unanimously

Ordered that said Murray Glantz be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority for a period of three (3) months, effective February 16, 1976, and until the further order of this Court; and it is further unanimously

Ordered that said Murray Glantz be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, for a period of three (3) months, effective February 16, 1976, and until the further order of this Court.

ENTER:

HYMAN W. GAMSO

Clerk.

Order of Appellate Division & Notice of Entry

APPELLATE DIVISION-SUPREME COURT-FIRST
DEPARTMENT
STATE OF NEW YORK

HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Jan. 15, 1976 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Jan. 15, 1976.

s/ Hyman W. Gamsco
Clerk

SUPREME COURT, APPELLATE DIVISION

First Department, December 1975

Theodore R. Kupferman, J.P.,
Francis T. Murphy, Jr.,
Vincent A. Lupiano,
Louis J. Capozzoli,
Myles J. Lane, JJ.

In the Matter

of

Murray Glantz,

an Attorney

Motion No. 2671
December 2, 1975

Order of Appellate Division & Notice of Entry

Disciplinary proceedings instituted by The Association of the Bar of the City of New York. Respondent was admitted to the Bar in December 1956 at a Term of the Appellate Division of the Supreme Court, Second Judicial Department. By order of this Court entered October 31, 1972, Louis J. Paley, Esq. was appointed Referee.

John G. Bonomi of counsel (Daniel J. Bloom with him on the brief) for petitioner

William B. Jacobs, attorney for respondent

Motion No. 2671 — December 2, 1975

In re Murray Glantz, an Attorney

PER CURIAM:

Respondent was admitted to the New York Bar in 1956. There were two charges leveled against him, both alleging failure to diligently prosecute claims of two separate individuals.

As to the first charge, respondent was forwarded the personal injury claim of one Carole Farr for prosecution. This action, after being commenced on Ms. Farr's behalf by respondent was dismissed by order of the United States District Court for the Southern District of New York entered on or about July 2, 1963 for failure to prosecute. Such dismissal occurred as a consequence of respondent's failure to appear or otherwise submit papers in opposition on the return date of the defendant's motion to dismiss. Respondent is charged with having failed to take steps to restore this matter to the calendar or to promptly advise the forwarding attorneys or the client of the dismissal of the complaint. Scrutiny of the record of the proceedings before the Referee does not support the Referee's conclusion that this charge is not sustained. Upon being

Order of Appellate Division & Notice of Entry

apprised of the dismissal, the forwarding attorneys requested return of the file from respondent and upon obtaining same, instituted a motion on their client's behalf to be relieved of the default. This motion, made approximately one year and four months after entry of the dismissal order, was denied as violative of Rule 60(b) of the Federal Rules of Civil Procedure which requires such motion to be made "no more than one year after the judgment, order, or proceeding was entered or taken." Patently, on the record herein, from the time of entry of the dismissal order on July 2, 1963 until at least the beginning of 1964, respondent failed to take any steps to restore this matter to the calendar or to advise the forwarding attorneys or Ms. Farr of the dismissal. The possibility that the forwarding attorneys did not expeditiously act upon receipt of the file to initiate a motion to vacate the default, even if proved, may not serve to alter or negate the respondent's neglect. We accordingly disaffirm the Report of the Referee insofar as this charge is concerned and find that such charge has been sustained.

The Referee found as to the second charge involving a Mr. William Robinson, that the culpability of respondent was not of such a degree as to sustain the charge and we concur in that conclusion. Accordingly, we confirm his report in this respect. It is also noted that respondent has a history of previous letters of admonition issued by the Grievance Committee in lieu of presenting formal charges. As to these circumstances, it is noted in *Matter of Wildove v. New York State Bar Association*, 40 AD 2d 1042, 1043 (3rd Dept., 1972) "that such information as to the similar disposition of prior complaints of professional misconduct is always relevant and material on the question of the degree of punishment warranted for subsequent misbehavior." The fact that attention is properly called by petitioner to such prior discipline may not serve as the predicate for granting respondent's request to transfer this matter to another Department on the ground of prejudice. Consideration of all relevant circumstances warrants concluding that a

Order of Appellate Division & Notice of Entry

suspension from practice for a period of three months is sufficient punishment. We therefore deem it appropriate that respondent should be suspended for a period of three months.

All concur.

ORDER OF APPELLATE DIVISION DENYING STAY

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 26, 1976

Present—Hon. Theodore R. Kupferman, Justice Presiding,

Francis T. Murphy, Jr.,
Vincent A. Lupiano,
Louis J. Capozzoli,
Myles J. Lane, Justices.

In the Matter

of

Murray Glantz,

An Attorney.

FILED

Feb. 26, 1976

Appellate Division, Supreme Co.
First Department

M-312

Order of Appellate Division Denying Stay

The above-named respondent having moved for leave to reargue Motion No. 2671 of December 2, 1975, which motion was decided by the order of this Court entered on January 15, 1976, suspending respondent from practice as an attorney and counselor-at-law in the State of New York for a period of three months, effective February 16, 1976, or, in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the petition of Murray Glantz, verified January 29, 1976, and the memorandum of Irving Anolik in support of said motion, and the affidavit of Saul Friedberg, sworn to February 13, 1976, and memorandum in opposition thereto, and after hearing Mr. Irving Anolik forward the motion and Mr. Saul Friedberg opposed,

It is ordered that said motion be and the same hereby is, in all respects, denied. The stay, dated January 30, 1976, affixed to the notice of motion, is vacated.

ENTER:

HYMAN W. GAMSO

Clerk.

APPELLATE DIVISION-SUPREME COURT-FIRST
DEPARTMENT

HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Feb. 26, 1976 and that the same is a correct transcript thereof, and of the whole of said original.

Order of Appellate Division Denying Stay

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Feb. 26, 1976.

s/ Hyman W. Gamso

ANALYSIS OF THE RIGHT TO APPELLATE REVIEW IN NEW YORK

A. Professionals

<u>Profession</u>	<u>Statutory Trier-of-Fact</u>	<u>Court of Appellate Review as of Right</u>	<u>Scope of Appellate Review as of Right</u>
1-Attorneys	Appellate Division (Judiciary Law § 90)	Court of Appeals (Judiciary Law §90(8))	None as to facts; none as to law except when a Constitutional issue is the only question or appar- ently when a Justice of the Appellate Division dissents
2-Physicians, Chiropractors, Engineers, Accountants, Nurses, and all others covered by Education Law §6500-8208	Board of Regents (Education Law §6510(3))	Appellate Divi- sion, Third De- partment (Education Law §6510(4))	All questions of law and "sub- stantial evidence" test as to facts

Analysis of the Right to Appellate Review in New York

B. Civil Litigants

<u>Statutory Trier-of-Fact</u>	<u>Court of Appellate Review as of Right</u>	<u>Scope of Appellate Review as of Right</u>
1- Supreme Court	Appellate Division (CPLR 5701(a))	Questions of law and questions of fact (CPLR 5501(c))
2- County Court	Appellate Division (CPLR 5701(a))	Questions of law and questions of fact (CPLR 5501(c))
3- Family Court	Appellate Division (Family Court Act §1111)	Questions of law and questions of fact (CPLR 5501(c))
4- Surrogate's Court	Appellate Division (Surrogate's Court Act §2701)	Questions of law and questions of fact (CPLR 5501(c))
5- Court of Claims	Appellate Division, Third or Fourth Department (Court of Claims Act §24)	Questions of law and questions of fact (Court of Claims Act §24)
6- District Court	Appellate Term or County Court (Uni- form District Court Act §1701)	Questions of law and questions of fact (CPLR 5501(d))
7- Civil Court, City of New York	Appellate Division or Appellate Term (N.Y.C. Civil Court Act §1701)	Questions of law and questions of fact (CPLR 5501(d))
8- Other City Courts	Appellate Term or County Court (Uni- form City Court Act §1701)	Questions of law and questions of fact (CPLR 5501(d))
9- Justice Court	Appellate Term or County Court (Uni- form Justice Court Act §1701)	Questions of law and questions of fact (CPLR 5501(d))

AUG 26 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976
No. **76-151**

In the Matter of
MURRAY GLANTZ, An Attorney,
Petitioner,
—V.—

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK,
Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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Statement

On September 11, 1972, respondent initiated a proceeding against petitioner in the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, in which respondent charged petitioner with professional misconduct (17a*). The jurisdiction of the court derived from Section 90 of the Judiciary Law of New York.

The court appointed a referee to take testimony as to the charges and to report the same with his opinion to

* All such references are to the pages in the Petition and its Appendix.

the court. The referee held a hearing at which petitioner had full opportunity to present evidence,* and thereafter rendered his report to the court on September 3, 1975. (17a)

The facts relevant to the instant proceeding, as reported by the referee (2a to 14a), found by the court (21a to 23a) and conceded here by petitioner (3-4), are as follows.

In 1961 petitioner, a New York attorney-at-law, accepted a referral of a personal injury case, the *Farr* case, from attorneys Schachter and Eisenberg (5a), and commenced an action on it which was transferred by the defendant to the United States District Court. (6a)

On or about May 14, 1963, the defendant in the *Farr* case moved, on notice to petitioner as the attorney for the plaintiff, to dismiss the case for failure to prosecute. (6a)

Petitioner defaulted on the motion, which was granted by an order of July 2, 1963 dismissing the case for failure to prosecute. (22a)

"... from the time of entry of the dismissal order on July 2, 1963, until at least the beginning of 1964, [petitioner] failed to take any steps to restore this matter to the calendar or to advise the forwarding attorneys or Ms. Farr [the client] of the dismissal." (22a)

At the beginning of 1964, petitioner returned the dismissed *Farr* case to the forwarding attorneys, who then gave Ms. Farr "false representations as to the status of the case" (12a) and allowed the statute of limitations to run. (11a-12a)

* The statement in the petition that the court acted "without affording [petitioner] any hearing whatsoever . . . by way of calling witnesses" (10) is therefore ambiguous and misleading.

On the basis of these facts, it is clear that petitioner was guilty of professional misconduct, i.e., neglect of his client's case. However, while reporting all of the foregoing facts, the referee, nevertheless reported to the court that, in his opinion, petitioner was not guilty of professional misconduct in relation to the *Farr* case because the conduct of the forwarding attorney, Schachter, after the case was returned to him, was worse than that of the petitioner. Respondent "would have had a much stronger case for discipline against Schachter than [it] had against [petitioner]." (12a) The referee's conclusion was obviously erroneous since the professional misconduct which respondent committed was not erased by the fact that the forwarding attorney may have done worse.

Because of this obvious legal error, the court had no choice but to disaffirm its referee's report and find petitioner guilty of professional misconduct in the *Farr* case which it did, saying: "The possibility that the forwarding attorney did not expeditiously act upon receipt of the file to initiate a motion to vacate the default, even if proved, may not serve to alter or negate the [petitioner's] neglect." (22a)

The court thereupon made an order, January 15, 1976, suspending petitioner from the practice of law for three months, effective February 16, 1976. (19a) On February 26, 1976 the court denied petitioner's motion for leave to reargue (24a) and on May 4, 1976 petitioner's motion for leave to appeal to the New York Court of Appeals was denied. (1a)

By reason of a stay, petitioner's three month suspension did not commence until May 13, 1976. (1)

ARGUMENT

POINT I

There is no reason for the granting of a writ of certiorari in this case. Petitioner's constitutional claims have neither weight nor merit.

1.

Petitioner admits committing acts constituting neglect of his client's cause (3-4). Neglect of a client's cause is universally recognized as professional misconduct. DR6-101(A)(3) of the Code of Professional Responsibility reads:

"A lawyer shall not: . . . 3. Neglect a legal matter entrusted to him."

DR1-102, which is titled "Misconduct", reads:

"A lawyer shall not: 1. Violate a Disciplinary Rule."

The action of the New York court at bar in imposing discipline upon petitioner for admittedly neglecting a client's cause is therefore reasonable and constitutionally proper. The extent of the discipline imposed, a suspension of three months, is, beyond question, of a mildness which prevents any claim of constitutional unreasonableness. This being so, the discipline imposed on petitioner at bar would be constitutionally proper no matter what defects there might be in the disciplinary procedures followed at bar or provided generally by New York law.

In short, petitioner has not been hurt by any of the alleged constitutional defects he claims exist.

2.

However, petitioner's broadside attack on New York disciplinary procedures is in fact without merit or weight. All of the attacks he makes (but one, discussed below) were made, and carefully considered by a three-judge federal court, and rejected in a well-considered opinion which was recently affirmed in a direct appeal to this court. *Mildner v. Gulotta*, 405 F. Supp. 182 (EDNY 1975), affirmed — U.S. — (March 29, 1976).

3.

Petitioner raises one point not raised in *Mildner v. Gulotta*. In its Memorandum to the court in support of its motion to disaffirm the referee's report, respondent inserted a separate section reading as follows:

"Prior Discipline"

"1. On November 26, 1968, respondent was admonished by Petitioner's Committee on Grievances for issuing worthless checks.

"2. On December 3, 1970, respondent was issued a letter of admonition for permitting a layman to use his status as an attorney and also for issuing worthless checks.

"3. On November 2, 1970, respondent was admonished by the Committee on Grievances for neglecting six negligence matters referred to him by another attorney and for falsely representing the status of these matters to that other attorney.

"4. On December 7, 1971, respondent was issued a letter admonition for the conduct of his office staff and hanging up on inquiries from people who called to inquire regarding their bill."

The information as to these prior admonitions was not before the referee, but was submitted to the court for consideration on the issue of the extent of discipline to be imposed.

In its memorandum decision, the court said on the point:

"It is also noted that respondent has a history of previous letters of admonition issued by the Grievance Committee in lieu of presenting formal charges. As to these circumstances, it is noted in *Matter of Wildove v. New York State Bar Association*, 40 AD 2d 1042, 1043 (3rd Dept., 1972) 'that such information as to the similar disposition of prior complaints of professional misconduct is always relevant and material on the question of the degree of punishment warranted for subsequent misbehavior.' The fact that attention is properly called by petitioner to such prior discipline may not serve as the predicate for granting respondent's request to transfer this matter to another Department on the ground of prejudice."

Petitioner here argues that his rights were violated by the submission to the court of the information as to prior admonitions. He says that he had no opportunity "to confront them or answer them". (20)

This argument is factually incorrect.

Petitioner had the opportunity, in his written submission in opposition to respondent's motion to disaffirm the referee's report, to confront and answer the prior admonitions in writing; if there was anything about any one of them he wished to dispute, he could have done so. However, as is evident from the above quotation from the memorandum

opinion of the court, petitioner did not attack these admonitions on the merits.

Further, when the admonitions were issued petitioner had full opportunity to attack them on the merits. He failed to take those opportunities, and, in effect accepted the admonitions, which are, therefore, properly useable against him in connection with the extent of discipline to be imposed.

Two of the admonitions were issued by respondent's Committee on Grievances. These were issued after full hearings at which petitioner had the opportunity to be present in person and by counsel, to confront witnesses, etc. They are therefore binding upon petitioner. Further, petitioner had the right, which he did not exercise, to have the propriety of the admonitions tested in the courts by means of a proceeding under Article 78 of the New York Civil Practice Law and Rules.

The other two admonitions were issued by the Chief Counsel of respondent's Committee on Grievances.

According to the procedures of the Committee on Grievances, a copy of which was sent to petitioner when respondent's investigations were initiated:

"Letter admonitions, signed by the Chief Counsel, are sent in instances where the staff investigation discloses relatively minor misconduct. If, upon receipt of such a letter admonition, the respondent-attorney disputes the conclusion that he has not acted properly, he may request a formal hearing before the Committee."

In neither case did petitioner request a formal hearing.

Petitioner's argument to this court concerning these admonitions does not, therefore, have either weight or merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
August 24, 1976

Respectfully submitted,

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